Supreme Court, U.S.
FILED
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No. 04-299

IN THE

Supreme Court of the United States

Dr. Lionel Kolker,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

On Petition for a Writ of Certiorari
To the Ninth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Dr. Lionel Kolker, pro per
c/o 3777 Torrey View Court
San Diego, California

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QUESTIONS PRESENTED

The Ninth Circuit Court of Appeals affirmed a decision of the United States Tax Court that stated Dr. Kolker's petition to state a claim. The Tax Court ruled Donald Zimmerman's petition was also not a real petition and claimed he filed his notice of appeal untimely. These holdings raise five substantial federal questions warranting review by this Court:

1. Whether the court of appeals was also non-responsive to the petition.
2. Whether an entire statement of facts may be construed as "frivolous and groundless arguments" and, or to not exist consistent with fundamental principals of fairness and due process.
3. Whether the legal opinions of a non-party, non-witness may be accepted by a judge as true consistent with principals of fairness and due process.
4. Whether both the trial court and the appeals court failed to apply this Court's standard to a motion to dismiss.
5. Whether the refusal to apply this Court's standard was a denial of the right to due process.

PARTIES TO THE PROCEEDING

Dr. Lionel Kolker is the petitioner. The commissioner of Internal Revenue is the respondent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dr. Lionel Kolker, petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit. The panel's decision is non-responsive, in plain contravention of the facts, current law and holdings of this Court. The Ninth Circuit panel

essentially denied review and its end was to plainly deny Dr. Kolker due process and a fair trial. This Court has held: "It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights..." Smithsonian Institution v. St. John, 214 U.S. 19, 28 (1909). Because these flagrant violations of well-established basic principals appears to be nation-wide and shock the conscience, review is warranted by this Court to stop the lawless actions of the inferior courts.

OPINIONS BELOW

The opinion of the Ninth Circuit (03-74029) panel is unreported. The tax court are number is 8124-01. These opinions are reproduced in the appendix.

JURISDICTION

The order denying rehearing were entered on July 19, 2004. The jurisdiction of this Court rests upon 28 USC § 1254(a).

As shown below, substantial federal questions were raised in both the tax court and the court of appeals and neither court addressed them:

"We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right...as if it had been specifically referred to and the right directly refused." Chapman v. Goodnow's Admin'r., 123 US 540, 548

(1887).

This Court has also held: "It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights..." Smithsonian Institution v. St. John, 214 U.S. 19, 28 (1909).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the United States Constitution provides that "No person shall...be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

Men and women doing business as ("D/B/A") the "Internal Revenue Service" ("IRS") sent me, Dr. Kolker, letters, including several called a "NOTICE OF DEFICIENCY." A "NOTICE OF DEFICIENCY" is collective legal opinions printed out on "official" looking paper.

These legal opinions include, but are not limited to 1) I am an alleged "taxpayer," 2) I am subject to the "laws" of the "United States," and 3) men and women D/B/A the "United States government" have an alleged "right" to my alleged assets.

Their ("IRS") claim to my property is factually identical to mine: I, Dr. Kolker, acquired property in California through mutual voluntary exchanges with other men and women.

These men and women include, but are not necessarily limited to "Ms. Sharp" #049546548 and Mr. Parizek #29-61699.

I sent "Ms. Sharp" a letter that I did not object to, protest, admit or deny anything. I wanted to settle the matter and avoid court. All I wanted were the alleged facts the opinions were based.

The men and women D/B/A the "IRS" were again non-

responsive as they had been for several years prior. Every time I asked for the facts their opinions were based they have been non-responsive.

I. UNDERLYING LITIGATION.

A petition was filed into the tax court. The grounds were: based on the complete non-responsiveness to factual inquiries, unwillingness to meet and the avoidance of cross-examination, and the legal opinions of "IRS" employees were arbitrary: "But the maxim applies, quod non apparet non est. The fact not appearing is presumed not to exist." Shepard v The Schooner Clara, 102 US 200, 202. Being arbitrary the tax court is obligated to set-aside the notices, Helvering v. Taylor, 293 U.S. 507, 514.

The commissioner's lawyer filed a motion to dismiss the petition alleging Dr. Kolker failed to state a claim. The commissioner's lawyer also misrepresented Kolker's position. While Kolker's position was there was no evidence he was a so-called "taxpayer" based on the commissioner's refusal to answer factual inquiries, the commissioner's lawyer claimed Dr. Kolker's position was "he is not a taxpayer."

Dr. Kolker filed a response and pointed out his justiciable claim i.e., the "assessment" was not based on facts, Helvering v. Taylor, 293 U.S. 507, 514; how the commissioner's lawyer was misrepresenting Dr. Kolker's position and provided the tax court with this Court's standards for a motion to dismiss, McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 246 (1980), Neitzke v. Williams, 490 U.S. 319, 323 (1989), and Scheurer v. Rhodes, 416 U.S. 232, 236 (1974).

The tax court judge was non-responsive to the petition and failed to apply the standards of this Court and granted the motion to dismiss. Essentially the tax court responded not to Dr. Kolker's petition, but to a petition filed by someone named "Studley." A motion for rehearing was filed by Kolker

and denied. Appeal was filed with the Ninth Circuit Court of Appeals.

The Ninth Circuit affirmed the decision without discussion. The panel refused to address the federal questions raised. A motion for rehearing en banc was filed and denied. Petition is now made to this Court.

A. The tax court decision. The tax court, judge Wells, was non-responsive and acted as a rubberstamp for the IRS. He construed facts as arguments and refused to comply with the rules of court, the due process clause and the holdings of this Court when he granted the motion to dismiss. The intent of his rulings was to deny Dr. Kolker due process and a fair trial.

1. The burden of proof for a motion to dismiss. This Court has long held the burden of proof for a motion to dismiss is "beyond doubt;" this is higher than the burden in a murder trial: "It is ***axiomatic*** that a complaint should not be dismissed unless "it appears ***beyond doubt*** that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957)..." McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 246 (1980) (emphasis added).

This court has held: "Unless there is "'***indisputably absent any factual or legal basis***'" for the wrong asserted in the complaint, the trial court, "[i]n a close case," should permit the claim to proceed at least to the point where responsive pleadings are required. Ibid. (citation omitted)." Neitzke v. Williams, 490 U.S. 319, 323 (1989) (emphasis added).

This Court has also long held: "...it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, ***the allegations of the complaint should be construed favorably to the pleader***." Scheurer v.

Rhodes, 416 U.S. 232, 236 (1974) (emphasis added).

2. There is doubt. The facts show a pattern of refusing to answer factual inquiries. This raises a strong presumption there are no facts: "But the maxim applies, *quod non apparet non est*. The fact not appearing is presumed not to exist." Shepard v The Schooner Clara, 102 US 200, 202. Both courts flagrantly disregarded federal policy, the due process clause and the standards of this Court when the motions were granted and affirmed: "No matter how unlikely it may seem that plaintiff will prove its entitlement to relief, ***federal policy favors disposition on the proofs*** rather than on the pleadings." 6th Camden Corp. v. Evesham TP., Burlington Cty., 420 F.Supp. 709, 720 (1976) (emphasis added).

The commissioner's entire case is based upon several witnesses i.e., revenue agents. It is irrational to believe these witnesses are somehow infallible or that it is "beyond doubt" they could not be impeached and their testimony, including the "NOTICE OF DEFICIENCY," be stricken in its entirety. This casts the necessary doubt to be fatal to the motion.

3. Petition has a factual and legal basis. The facts are the "IRS" made legal opinions against Dr. Kolker. Dr. Kolker asked for those facts and the "IRS" refused. There is a presumption there are no facts: "But the maxim applies, *quod non apparet non est*. The fact not appearing is presumed not to exist." Shepard v The Schooner Clara, 102 US 200, 202. Without facts, the opinions, the deficiency, is arbitrary and should be set-aside: "The fact that the Commissioner's determination of a deficiency was arbitrarily made may reasonably be deemed sufficient to require the Board to set it aside." Helvering v. Taylor, 293 U.S. 507, 514.

Without any facts to support their legal opinions, the "deficiencies" are "naked assessments" and "The determina-

tion of tax due then may be one "***without rational foundation*** and excessive," and not properly subject to the usual rule with respect to the burden of proof in tax cases. Helvering v. Taylor, 293 U.S. 507, 514-515 (1935)." United States v. Janis, 428 U.S. 433, 442 (1976) (emphasis added).

This is clearly a justiciable controversy within the jurisdiction of the tax court.

4. Both courts refused to construe the facts favorably to Dr. Kolker. The only reasonable presumption raised by the refusal to sit down with Dr. Kolker and provide the facts their legal opinions were based is there are no facts, *quod non apparet non est.*

Both courts were required to construe the non-responsiveness favorably to Dr. Kolker. Instead, both courts construed the refusal as "frivolous and groundless arguments." This is in direct contravention of this Court's holdings, Scheurer v. Rhodes, 416 U.S. 232, 236 (1974) "And, the complaint is to be liberally construed in favor of plaintiff." Jenkins v. McKeithen, 395 U.S. 411, 422 (1969).

5. In both cases the lowers courts based their opinions on nothing more than the opinions of lawyers who were neither parties nor witnesses in the litigation. Had the courts relied on the opinions of the actual witnesses, then the necessary doubt to overcome the motion to dismiss is cast by the discovery rules and Rules 602 and 607 of the FRE.

It is clear the courts based their opinions on either the opinions of the defense lawyers, or their own personal opinion in contravention of Rule 605 FRE. In either case due process is denied because Dr. Kolker were not permitted to confront those acting as witnesses against him.

II. PROCEEDINGS IN THE NINTH CIRCUIT COURT.

The Ninth Circuit affirmed the tax court decision without discussion. Not one federal question raised was addressed and mentioned.

A. FEDERAL ISSUES RAISED BELOW AND NOT RULED ON. In each proceeding the foregoing federal issues were raised and each court was non-responsive. The burden of proof (standards of this Court) was not mentioned in either decision.

REASONS FOR GRANTING PETITION.

There are few reasons more important than those presented by this case. The public perception of the judicial system is damaged when judges flagrantly disregard long held principals, rules of procedure and the holdings of this Court. Despite knowing the law, and having it presented over and over again in pleadings, the tax court and the Ninth Circuit panel knowingly, and deliberately refused to comply with the due process clause and the holdings of this Court.

I. **Review is warranted because confidence in the system is eroded**. Review is warranted because both courts disregarded the holdings of this Court. Confidence in the system is lost when judges themselves refuse to comply with the rules. As shown below, unless this Court exercises its inherent supervisory jurisdiction, the lower courts will continue their lawless rule.

II. **Review is warranted because the abuse is nation-wide**. The refusal to comply with the rules is not limited to this case; it is institutional and nation-wide.

In Nis Family Trust v. Commissioner, 115 TC 523 (2000), the "IRS" refused to comply with discovery and refused to attend depositions. Despite this, the tax court

granted judgment. Fifty thousand dollars in sanctions precluded review. This itself is a *deplorable* tactic of trial judges.

There is also the unreported case of Campbell v. Commissioner, No. 01-71355 from the Ninth Circuit court of appeals. The same errors were committed by tax court judge Wells and "review" consisted of a rubberstamp similar to this case. Unreported case #99-4286-GG, Case v. Webb, from the Eleventh Circuit Court of Appeals is another case where cross-examination was brazenly denied in the trial court and the appeal panel failed to mention the words "cross-examination" in the "decision." They failed to mention the words when this Court has consistently held: "a denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Smith v. Illinois, 390 U.S. 129, 131 (1968). Despite being an "error of the first magnitude," the lower courts act as if it is a "harmless error" that doesn't warrant being mentioned.

There are also many other cases where tax court judges refuse to comply with the rules. This is why so many people who have been to the tax court characterize it as an "IRS rubberstamp."

A. Due process is an empty political phrase. If judges can get away with construing facts as mere arguments then due process is nothing more than political rhetoric. Pretending a statement of facts and a justiciable claim is missing is chilling and shocks the conscience. There can be no due process if judges are permitted to continue such acts.

A burden of proof is put into place to ensure each litigant gets due process and a fair trial. This Court has declared, *in no uncertain terms*, what that burden is with a motion to dismiss: "It is ***axiomatic*** that a complaint should not be dismissed unless "it appears ***beyond doubt*** that the

plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957)..." McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 246 (1980) (emphasis added).

This is why motions to dismiss are not favored by federal policy: "Motions to dismiss are generally viewed with disfavor and rarely granted." Wrenn v. State of Kansas, 561 F.Supp. 1216, 1220 (1983). In practice motions to dismiss are granted routinely in the tax court and against the "IRS" in general.

Due process is denied when a judge, on nothing more than a motion, silently decides it is "beyond doubt" the legal opinions of a revenue agent is not, and could not be arbitrary. Due process is denied when a reviewing court fails to mention this incredibly high burden in their decision. The failure to mention the burden in its decision is clearly to deny Dr. Kolker due process and a fair trial, Smithsonian Institution v. St. John, 214 U.S. 19, 28 (1909).

CONCLUSION

For the foregoing reasons this Court should grant the petition for a writ of certiorari.

Submitted this 30th day of August, 2004.

Dr. Lionel Kolker

UNITED STATES TAX COURT
Washington, D.C. 20217

LIONEL DAVID KOLKER,	)	
	)	
Petitioner,	)	
	)	
v	)	Docket no. 567-03
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

ORDER OF DISMISSAL AND DECISION

Respondent determined deficiencies and additions to tax under sections 6651(a)(1) and 6654(a) in petitioner's 1997 and 1998 Federal incomes taxes as follows:

		Additions to tax	
Year	Deficiency	Sec. 6651(a)(1)	Sec. 6654(a)
1997	$68,379	$17,094.75	$3,658.32
1998	919	229.75	-0-

Petitioner filed a timely petition. The gist of the petition is that petitioner is not a taxpayer and is not subject to the Internal Revenue Code. Petitioner otherwise does not contest the deficiencies and additions to tax determined by respondent. Although petitioner resided in San Diego, California, at the time the petition was filed, he requested Salt Lake City, Utah, as the place of trial.

On February 5, 2003, respondent filed a Motion to Dismiss for failure to State a Claim Upon Which Relief Can Be Granted. On February 6, 2003, The Court ordered that petitioner, on or before April 4, 2003, file and amended petition setting forth with specificity each error petitioner alleges respondent made in the determinations of the deficiencies and additions to tax and the facts upon which petitioner bases each assignment of error. It was further ordered that respondent's motion was calendared for hearing in Salt Lake City, Utah, on June 9, 2003.

On February 25, 2003, petitioner submitted a document that we filed as a motion to vacate the Court's order dated February 6, 2003. As with the petition, this document contains frivolous rhetoric and does not comply with our order of February 6, 2003. That motion was carried with the case to the hearing in Salt Lake City.

When this case was called from the calendar at the Trial Session of the Court in Salt Lake City, Utah, on Mune 9, 2003, there was no appearance by or on behalf pf petitioner. Counsel for respondent appeared and presented argument in support of his motion to dismiss. Respondent also supplemented the motion to dismiss with Certificates of Assessment and Payments showing petitioner filed no returns for the taxable years 1997 and 1998.

Turning first to the deficiencies and the additions to tax, the burden of establishing that respondent's determinations are erroneous generally is on the petitioner. Petitioner has not satisfied any of the requirements of section 7491(a) to shift that burden to respondent. Furthermore, as to the additions to tax, respondent has satisfied the burden of production under section 7491(c). See Higbee v. Commissioner, 116 T.C. 438, 446-448 (2001).

Petitioner's sole argument is that he is not a taxpayer subject to the Internal Revenue Code. This argument is frivolous. United States v. Studley, 783 F.2d 934, 937 (9th Cir. 1986). Petitioner has not stated a recognizable claim, and respondent's motion will be granted.

At the hearing, the Court raised the issue whether damages should be awarded under section 6673(a). Section 6673(a) provides, inter alia:

> (a) Tax Court Proceedings.--
> (1) Procedures instituted primarily for delay, etc.--Whenever it appears to the Tax Court that--
> (A) proceedings before it have been instituted or maintained by the taxpayer primarily for delay,
> (B) the taxpayer's position in such proceeding is frivolous or groundless, or
> (C) the taxpayer unreasonably failed to pursue available administrative remedies,

the Tax Court, in it decision, may require the taxpayer to pay to the United States a penalty not in excess of $25,000.

Petitioner does not dispute that he recieved the income as determined by respondent. Rather, he argues that he is not a taxpayer subject to the Internal Revenue Code. There is no question that petitioner's argument is frivolous and/or groundless. As the Court of Appeals for the Ninth Circuit (to which an appeal would lie in this case) noted:

this argument has been consistently and thoroughly rejected by every branch of the government for decades. Indeed advancement of such utterly meritless arguments is now the basis for serious sanctions imposed on civil litigants who raise them. [*United States v. Studley*, supra at 937 n.3.]

Damages under 6673 are appropriate in this case.

After due consideration, it is

ORDERED that respondent's motion to dismiss, filed February 5, 2003, is granted and this case is dismissed for petitioner's failure to state a claim upon which relief can be granted. It if further

ORDERED AND DECIDED that there are deficiencies in Federal incomes taxes and additions to tax due from petitioner for the taxable years 1997 and 1998 as follows:

		Additions to tax	
Year	Deficiency	Sec. 6651(a)(1)	Sec. 6654(a)
1997	$68,379	$17,094.75	$3,658.32
1998	919	229.75	-0-

It is further

ORDERED that petitioner shall pay damages to the United States under section 6673(a) in the amount of $10,000.

(Signed) Thomas B. Wells

Thomas B. Wells
Chief Judge

Entered: **JUL 15 2003**

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May 17 2004
CATHY A. CATTERSON
CLERK US COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIONEL DAVID KOLKER,

Petitioner – Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent – Appellee.

No. 03-74029

IRS no. 567-03

MEMORANDUM*

Appeal from a decision of the
United States Tax Court

Submitted May 10, 2004**

Before CANBY, KOZINSKI, and PAEZ, Circuit Judges

Lionel David Kolker appeals pro se the Tax Court's ~~order dismissing Kolker~~'s petition disputing tax deficiencies and additions asserted by the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

* This panel unanimously finds this case suitable for decision

without oral argument. *See* Fed. R. App. P. 34(a)(2).

Commissioner of Internal Revenue and directing Kolker to pay $10.000 in sanctions to the United States pursuant to Section 6673(a) of the Tax Code.

The Tax Court did not err in dismissing the petition for failure to state a claim upon which relief can be granted because the petition failed to set forth any clear and concise assignments of error or any facts demonstrating any error in the Commissioner's determinations, as required by Tax Court Rule 34(b)(4) and (5).

Kolker's only challenge to the Tax Court's sanctions award is that the erroneous dismissal of the petition renders the sanctions award moot. This contention is unavailing because the dismissal of the petition was not erroneous.

The Commissioner's motion that Kolker be sanctioned pursuant to 28 U.S.C. 1912 and Fed.R.App.P 38 for bringing a frivolous appeal is GRANTED in part. We award damages to the government in the amount of $1,500.

Kolker's motion "to admit newly discovered evidence,"** construed as a motion to supplement the record on appeal, is DENIED.

The Tax Court's order is **AFFIRMED.**

**The newly-discovered evidence Kolker want this court to consider is a transcript of a settlement hearing with Internal Revenue employees that occurred February 23, 2004, seven months after the order from which Kolker appeals was filed.

FILED
July 16 2004
CATHY A. CATTERSON
CLERK US COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIONEL DAVID KOLKER,

Petitioner – Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent – Appellee.

No. 03-74029

IRS no. 567-03
Northern District of California, San Francisco

ORDER

Before CANBY, KOZINSKI, and PAEZ, Circuit Judges

Judges Kozinski, and Paez have voted to deny appellant's petition for rehearing en banc and Judge Canby so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed.R.App.P 35.

The petition for rehearing en banc is denied.

No further filings will be accepted in this closed appeal.